Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Accipiter Communications, Inc. and Qwest Corporation Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules	)	CC Docket No. 96-45

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Accipiter Communications, Inc. ("Accipiter") replies to the Opposition to its Application for Review[1] filed by Cox Communications, Inc. ("Cox") on February 28, 2011. The National Telephone Cooperative Association and Qwest Corporation supported Accipiter. On March 1, 2011 the National Exchange Carrier Association ("NECA") filed a letter stating that grant of the requested waiver would not cause an undue administrative burden on NECA and that its pooling process could accommodate a carrier that has forgone USF in a portion of its study area. The then Chairman of the Arizona Corporation Commission ("ACC") supported grant of the Application for Review in a letter to Chairman Genachowski on Dec. 10, 2010.

[1] Accipiter asked the Commission to overrule the Order of the Wireline Competition Bureau denying the Petition of Accipiter and Qwest Corporation ("Qwest") for waiver of the Commission's frozen study area rule. *Accipiter Communications, Inc. and Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules*, Order, Order, 25 FCC Rcd 12663 (WCB 2010).

I COX'S OPPOSITION IS WITHOUT MERIT

Accipiter's Application for Review explained that among the "special circumstances" justifying its waiver was the fact that Accipiter's entry into the area to be added to its study area was substantially delayed by the unlawful exclusive service agreement between Cox and the developer.[2] Perhaps because it is not a rate of return regulated ILEC, Cox fails to understand the inequities and burdens on Accipiter of operating under the regulatory uncertainties created by the Order as well as the Order's adverse implications for policy implementation.[3] Cox, like the Bureau, fails to recognize that where the *sole* stated purpose of the freeze order was to control USF growth, the public interest must be evaluated in relation to that purpose. The public interest test is not an unbridled license to decide without reason or explanation to abandon years of precedent upon which regulated companies reasonably relied to conduct their business. The Bureau is bound by the Commission's *US West/Eagle* decision and the scores of decisions following it until those policies and precedents are changed by the Commission on the basis of a reasoned analysis.

A. The Uncertain Regulatory Status Of Accipiter Following The Bureau Order Is A Substantial Burden Unrelated To Any Articulated Or Valid Policy Objective.

Accipiter's Application for Review explains in detail the regulatory uncertainties created by the unprecedented Bureau Order. The issues include, among others, whether any carrier remains an ETC in South Vistancia; which carrier, if any is an ILEC there, and how does Accipiter perform jurisdictional allocations where it is not subject to Part 36? These uncertainties substantially inhibit Accipiter from investing in facilities to compete with Cox in South Vistancia because it cannot predict what rules will apply with respect to cost recovery, rate

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[2] Application for Review at 4-5.

[3] Cox did not oppose the original Petition for waiver filed in 2006.

setting and service obligations. Cox claims incorrectly that the burden of this uncertainty doesn't prevent Accipiter from serving Vistancia because Accipiter already serves the development and the settlement agreement provides opportunities that Accipiter hasn't even used.[4]

The fundamental flaw in Cox's argument is that it generalizes conditions to the entire Vistancia development without recognition that Accipiter's regulatory status is materially different in the northern and southern portions of the development. The settlement agreement did not resolve the regulatory differences between the northern portion of Vistancia which lies within Accipiter's current study area and the southern portion of Vistancia which lies within the four square miles subject to the petition for a study area waiver.

In 2005 the settlement agreement removed anticompetitive barriers to entry that had prohibited Accipiter from making network investment before that time. The company immediately began participating in the developer's utility construction for future residential parcels.[5] Accipiter has placed facilities in every trench opened since the settlement and has utilized every useful portion of the conduit provided in the settlement.[6] However, there are a significant number of lots where utility construction was completed before the settlement. Because of this Cox is the only wireline provider serving approximately 1,900 homes in the area subject to the petition.[7] Accipiter cannot invest in this area without the regulatory clarity of a study area waiver.

Cox also represents that Accipiter's $1 million settlement payment more than compensates for what Cox characterizes as Accipiter's "litigiousness." Accipiter has taken great

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[4] Opposition at 4-5.

[5] In this process the developer paid for opening the utilities trench thus significantly reducing Accipiter's construction costs.

[6] The investments described are in both the northern and southern portions of Vistancia.

[7] The conduit made available in the settlement is limited to "backbone" routes and does not provide access to individual homes where the utility trenches were closed to Cox's advantage.

risks and made significant accommodations to serve the Vistancia development. Of the $1 million payment, over $500,000 went to offset Accipiter's legal costs of the proceeding which resulted in the settlement. The remainder of the $1 million was available to Accipiter for investment in facilities, but pales in comparison to the $1.75 million that Cox received as a capital contribution for serving Vistancia.[8]

Accipiter recognized in its Application for Review that many rural telephone companies function as both ILECs and CLECs, but explained the fundamental difference between those situations and the unnecessary uncertainties the Bureau Order has imposed on Accipiter.[9] In the former, where ILECs voluntarily operate as CLECs in the territory of another ILEC, their status as ILEC or CLEC in a given location is recognized by federal and state regulators, and there is no confusion as to which set of rules is applicable to which operation. The Bureau Order, by contrast and without acknowledgement or explanation, has forced Accipiter into a regulatory never-never land where it is treated as an ILEC for some purposes but apparently not for others and its ETC status is questionable. Cox ignores Accipiter's explanation of the distinction with other rural ILEC/CLECs, and dismisses Accipiter's concerns about regulatory burdens.

Cox suggests that if the burdens are real, Accipiter should seek relief from the Arizona Corporation Commission[10] but the ACC does not have the authority to grant relief from the uncertainties in application of federal rules and the prohibition from including the additional lines in the NECA process that is the burden. The burden from which Accipiter seeks relief is not state ILEC regulation.

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[8] Cox received $2M in initial capital contributions from the Vistancia developer and paid only $250,000 of the $1M paid to Accipiter in the settlement. The settlement also released Cox from its future obligations to share revenue with the developer.

[9] Application for Review at 20-21.

[10] Opposition at 3.

Cox then accuses Accipiter of threatening the residents of Vistancia that it will shift the regulatory burdens to them.[11] Accipiter's point was that the uncertainties involved in the accounting process of determining its costs in South Vistancia when the intrastate and interstate costs are determined under different rules would necessarily increase its costs of providing service and inhibit it from investing. It is not a threat to state the truth that these ill effects harm the residents of Vistancia both by increasing the costs that must be covered by rates and, perhaps more importantly, reducing the probability that they will have available a valid alternative to Cox's service. Where rates go up and competition is reduced, the public is harmed.

B. Grant Of The Waiver Allowing Accipiter To Add Lower Cost Lines To The NECA Pools Would Benefit The Public Without Detriment To Cox

1. Reduction in Accipiter's average per line cost would reduce its USF support.

Accipiter began providing service in 1997 to a remote area where the majority of residents had no access to telephone service. Working with the Rural Utilities Service, Accipiter extended service to these areas for the first time and modernized the archaic open wire multi-party facilities it had acquired from US West (now Qwest). Because of the extremely low density of the area, Accipiter became one of the highest cost per line carriers in the country. When the Vistancia development was announced in 2001, Accipiter recognized that incorporating a much higher density area would substantially lower its average cost per line and thereby significantly reduce its dependence on Universal Service Fund support.[12] The Bureau's denial of the study area waiver petition does not have a rational basis from this perspective. If allowed to stand, the Order will frustrate the Commission's announced policies for reform of the

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[11] Opposition at 4.

[12] The southern portion of the planned development was in an uninhabited area of open desert which, although certificated to it, Qwest had no existing or nearby facilities or customers. Accipiter commenced the state proceedings that ultimately resulted in a four square mile area being transferred to Accipiter's certificated area and ETC designated area.

Universal Service support mechanisms by denying Accipiter the opportunity to reduce its average costs and gain efficiency and economy of scale.[13] Accipiter estimates that had the Bureau granted its waiver within a year of the time it was filed, its support level today would be substantially below the Commission's proposed $3,000 cap per access line and would decline further in future years if Vistancia continues to grow. Reduction in Accipiter's USF support would benefit all USF contributors. The rural customers that depend on Accipiter as their only telecommunications provider would also benefit.

2. Participation in NECA benefits the public interest.

Cox alleges it isn't clear how NECA participation is in the public interest.[14] Like the Bureau Order, Cox ignores the prior Commission orders, cited by Accipiter, that have made it quite clear how the public benefits from NECA's tariffing and pooling functions. If there were no public benefit there would have been no reason to authorize the creation of NECA in the first place. NECA's centralized tariff function greatly reduces the administrative burden on the Commission that would otherwise have to deal with several hundred individual carriers. NECA's pooling process reduces the disparity in access charge levels that would otherwise occur, thereby helping achieve the Congressional purpose of uniform toll rates required by Section 254(g) of the Act. Despite Cox's claim that Accipiter's application seeks "subsidies,"[15] the NECA pooling and tariffing process involves no subsidy. Pool members recover only their costs of providing interstate access. NECA's March 1, 2011 letter notes the benefits of risk-sharing and stabilizing cash flow.

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[13] The USF/ICC NPRM indicates the Commission's belief that rural telephone companies can become more efficient through increased economies of scale. *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, Feb. 9, 2011 at para. 217.

[14] Opposition at 2.

[15] Opposition at 6.

Cox complains that adding the lines in south Vistancia to the NECA tariff would allow Accipiter to charge higher rates than Cox does, because Cox "mirrors" Qwest's interstate access rates. [16] Cox may choose to use Qwest's rates as a benchmark, but is not required to do so. Section 61.26 of the Commission's rules limits the interstate access rates of non-rural CLECs to those of the "competing ILEC." Among the myriad of regulatory puzzles created by the Bureau Order is whether Accipiter or Qwest is the ILEC in the area for federal purposes. Accipiter assumes it is the ILEC because of its CC&N from the ACC. But even if the Commission considers Qwest the ILEC in the four square mile area, it cannot be the "competing" ILEC because it does not offer service or have facilities or customers in the area.[17] Upon grant of the study area waiver, it will be clear that Accipiter is the competing ILEC, if it isn't already, and Cox will continue to be free to charge the same interstate access rates as Accipiter if it chooses.

C. It is in the Public Interest for Accipiter to retain its ETC designation in South Vistancia

The Application for Review pointed out that the Bureau Order ignored the question of the validity of the ACC's ETC designation under Section 214(e)(5). The logical implication of the statute's requirement that a rural telephone company's ETC service area must be its study area is that exclusion of the area from Accipiter's study area also excludes the area from Accipiter's ETC service area. Cox says there is no public interest issue here because it voluntarily provides Lifeline and Linkup service and there are no rural health care facilities. The key word in this claim is *voluntary.* Unlike an ETC, Cox is not required by Section 214(e)(1)(A) to provide

[16] Opposition at 3. Cox states that giving Accipiter the right to charge more in Vistancia is not in the public interest, only in Accipiter's interest. As a rate of return regulated ILEC, Accipiter is entitled to recover its costs of providing interstate switched access. By adding the South Vistancia lines to the NECA pool Accipiter's rates can be expected to be lower than a rate based on Accipiter's cost of those lines, including the cost of preparing and filing a tariff.

[17] Qwest notes that it is also concerned with the regulatory uncertainty regarding Carrier of Last Resort obligations, ETC status and Section 251(c) obligations that will result if the Bureau Order is allowed to stand. Qwest at 2.

Lifeline and Linkup or even the basic supported services required by Section 54.101 of the Commission's Rules. Grant of the waiver would reinstate Accipiter's ETC designation and would *compel* it to offer Lifeline and Linkup service in South Vistancia.

D. The Settlement eliminating the exclusive service agreement does not resolve the ill effects of the Bureau Order.

Cox's argument that nothing prevents Accipiter from serving Vistancia as a CLEC is irrelevant to the issues raised in the application for review. First, from the very beginning of the ACC proceedings, the objective has been to assure that the entire development has access to the service of an ILEC with carrier of last resort, ETC and Section 251(c) obligations. The Communications Act, Arizona law and a long list of Commission precedents find it is in the public interest for a carrier with such obligations to be available to subscribers, but there is no statutory basis, policy or precedent that supports forcing an ILEC to become a CLEC.[18]

Second, there is no business case for Accipiter to construct and operate a second CLEC in South Vistancia, especially given the significant head start that Cox obtained by virtue of its exclusive service agreement and the extensive regulatory delays faced by Accipiter.[19] There is a valid business case for Accipiter to operate in South Vistancia under the same rules as North Vistancia and the remaining 90+ percent of its rural study area, but the Bureau has prohibited it from following that course for no apparent reason.

Cox surprisingly goes on to assert that the Commission's prohibitions on exclusive service agreements are not relevant to it because the Vistancia development consists of single

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[18] Section 214(e)(3) provides a procedure for involuntary designation of a carrier as an ETC and Section 251(h)(2) authorizes the Commission to treat a CLEC as an ILEC but there is no stated authority for requiring an ILEC to be a CLEC.

[19] Accipiter has explained that in addition the required cost allocations would result in severe loss of support for Accipiter's low-density, high cost customers that would make service unaffordable to them. Accipiter *Ex Parte* Notice, March 11, 2011 at 3.

family homes rather than "multi-tenant environments."[20] The Application for Review explicitly recognized that distinction, but pointed out that the exclusive service agreement between Cox and the developer produced much the same type of harms the Commission's MTE policies are designed to prevent. Exclusivity has the greatest anti-competitive effect during the construction phase of a development. The settlement agreement removed the barriers to entry after substantial construction had occurred.

Cox also points out correctly that the Arizona Commission has not imposed the $2 million fine proposed by the ACC staff in the proceeding to investigate its exclusive service agreement.[21] The ACC docket has been inactive but has not been closed, so it cannot be said with certainty that the fine will not yet be levied.[22]

Accipiter raised the exclusive service agreement in the Application for Review in reference to the Bureau's conclusion that the record demonstrated no "special circumstances" or inequities that would justify waiver of the study area freeze. The record in the ACC proceeding demonstrates that this was very much a special circumstance in which Accipiter at great expense and risk actively brought to an end a practice that would otherwise most certainly have spread to "greenfield" developments nation-wide.[23] The settlement did not turn back the clock to reverse Cox's head start, the effects of which persist to this day. But for the exclusive agreement, the joint study area waiver petition would have been filed at least a year earlier.

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[20] Opposition at 5.

[21] Opposition at 5.

[22] Cox resisted the proposed fine with the argument that it entered into the exclusive service agreement on advice of counsel that it was legal, and then refused to produce the advice on the grounds of attorney-client privilege. *See*, Staff's Response to Cox's Reply Brief, ACC Doc. No. T-03471A-05-0064, Apr. 13, 2007.

[23] Cox apparently still doesn't get that there was anything wrong with the agreement.

II CONCLUSION

The Bureau's decision is entirely unjustified, unprecedented, irrational and materially impedes Accipiter's ability to make prudent investment decisions. Accipiter began life proposing to extend service to the unserved consistent with the goals of Sections 1 and 254 of the Communications Act and of Section 921 of the Rural Electrification Act.[24] As a small company seeking to reduce its dependence on Universal Service Support through service to a new development, Accipiter undertook expensive and risky litigation against one of the largest cable companies in the country and a very large developer. It prevailed in a proceeding that effectively expanded the reach of this Commission's prohibition against exclusive service agreements. It then endured another four years of delay during which it agreed to forgo Universal Service Support in the portion of the development outside of its original study area before the Bureau ultimately denied its study area waiver. The denial order has no basis in law or fact and should be reversed promptly and the requested waiver granted.

Respectfully submitted

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[24] 7 U.S.C. 921.

CERTIFICATE OF SERVICE

I, David Cosson, hereby certify that on this 15th Day of March, 2011 I transmitted a copy of the foregoing "Reply to Opposition to Application for Review" by electronic mail to the following:

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